**Talaco Communications, Inc. *and* Communications Workers of America, Local 1109, AFL–CIO.** Case 29–CA–18123

July 16, 1996

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Upon a charge filed by Communications Workers of America, Local 1109, AFL–CIO (the Union) on April 12, 1994, the General Counsel of the National Labor Relations Board issued a complaint on May 27, 1994, against Talaco Communications, Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. By letter dated August 20, 1994, the Respondent failed specifically to admit, deny, or explain any of the allegations in the complaint, but stated that the Respondent could not pay its bills because it was ''not getting paid by various vendors'' for the work it had done for them. By letter dated March 13, 1996, counsel for the General Counsel informed the Respondent that its August 20, 1994 letter did not qualify as an answer, and advised the Respondent that unless the Respondent filed an answer by April 1, 1996, a Motion for Summary Judgment would be filed.

On April 22, 1996, the General Counsel filed a Motion for Summary Judgment. On April 24, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that an answer to a complaint shall specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state. Section 102.20 further provides that ''any allegation in the complaint not specifically denied or explained in an answer filed . . . shall be deemed to be admitted to be true and shall be so found by the Board.''

The Respondent's August 20, 1994 letter does not constitute an adequate answer to the complaint. Although it asserts that the Respondent's inability to pay its bills was caused by the failure of its vendors to pay it for work done for them, the letter does not specifically admit, deny, or explain each of the allegations in the complaint. The Respondent's defense is one of economic necessity. It is well established that Section 8(a)(5) and (1) and Section 8(d) prohibit an employer that is a party to a collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). Here, the Respondent has breached its collective-bargaining agreement with the Union. An employer's claim that it is financially unable to make the required payments, even if proven, does not constitute an adequate defense to an allegation that the employer has violated Section 8(a)(5) and (1) by failing to abide by a provision of a collective-bargaining agreement. *Demun Market*, 314 NLRB 714 (1994); *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991). Therefore, the Respondent's letter has raised no issues warranting a hearing.

In the absence of good cause being shown for the failure to file an adequate answer, and in the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a New York corporation, with its principal office and place of business located at 163 Bay 31st Street, Brooklyn, New York, has been engaged in providing installation of telephone system services. During the year preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 directly for various enterprises located in States other than the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed in the States of New York, New Jersey & Connecticut excluding clerical employees, guards and supervisors as defined by the National Labor Relations Act, as amended.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees, and has been recognized as such representative by the Respondent. Recognition has been embodied in successive collective-bargaining

agreements, the most recent of which was effective by its terms for the period from December 19, 1990, through December 18, 1993. At all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

### B. *The Refusal to Bargain*

The collective-bargaining agreement described above contains, inter alia, provisions which require that the Respondent make periodic monthly contributions to the Union's Pension and Welfare Funds (Funds) on behalf of its unit employees, and union-security and dues-checkoff provisions which require that the Respondent deduct dues from the wages of its unit employees upon written authorization from the employees and remit the checked off dues each month to the Union. The periodic contributions to the Funds and the dues are due and payable on a monthly basis not later than 20 days after the end of the preceding month during which they accrued.

From about November 20, 1993, until an unknown date in May 1994, the Respondent unilaterally failed and refused to make its monthly contributions to the Funds for November 1993, in a timely manner, as required by the terms of the collective-bargaining agreement. Since about November 20, 1993, the Respondent has unilaterally ceased making and has continued to fail and refuse to make its monthly contributions to the Funds as required by the collective-bargaining agreement.

Since about December 1, 1993, the Respondent has continued to deduct monthly dues from the paychecks of its unit employees, but has failed to remit those dues to the Union. Until December 18, 1993, the Respondent engaged in this conduct without the Union's consent. We find that by failing to remit the checked off dues to the Union from December 1–18, 1993, the Respondent has violated Section 8(a)(5) and (1) of the Act.

By this conduct, the Respondent has refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, and has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

### C. *The Postcontract Expiration Dues-checkoff Violation*

After the collective-bargaining agreement expired on December 18, 1993, the Respondent continued to deduct monthly union dues from the paychecks of unit employees, but failed to remit those dues to the Union. Although it is well settled that an employer's obligation to abide by the terms of a dues-checkoff provision ceases with the expiration of the contract and the employer is no longer obligated to honor the employees' checkoff authorizations,[1] once the respondent honors the employees' checkoff authorizations and deducts the dues from the employees' paychecks it is not entitled to keep the checked off dues for itself.[2] Rather, if the sums are deducted by the employer pursuant to valid checkoff authorizations that have not expired or been revoked, those sums represent dues to which the union is entitled. By signing checkoff authorizations, the employees have expressed their desire to have certain sums deducted from their paychecks and paid by the employer to a labor organization. By such action the employees have exercised their Section 7 rights to join and assist a labor organization. We find that an employer interferes with, restrains, or coerces employees in the exercise of their Section 7 rights to join and assist a labor organization in violation of Section 8(a)(1) of the Act where, as here, it retains for itself dues that it checked off from employees' paychecks after the expiration of a collective-bargaining agreement. Thus, if the sums deducted from the employees' paychecks after December 18, 1993, were deducted pursuant to valid, unexpired, and unrevoked checkoff authorizations, the Respondent's failure to remit those sums to the Union in accordance with the expressed wishes of the employees violated Section 8(a)(1) of the Act. Similarly, if the employees' checkoff authorizations expired or were revoked after the expiration of the collective-bargaining agreement, the Respondent's continued deduction and retention of the checked off sums and failure to return those sums to the employees violated Section 8(a)(1). Because the complaint does not specifically allege that the dues were deducted pursuant to valid, unexpired, and unrevoked employee checkoff authorizations, it is unknown whether the employees' checkoff authorizations expired at the expiration of the collective-bargaining agreement. Accordingly, we leave to the compliance stage of this proceeding the determination of whether the sums deducted and retained by the Respondent in violation of Section 8(a)(1) after the expiration of the collective-bargaining agreement were deducted pursuant to valid checkoff authorizations that were not expired or revoked. If the dues were deducted pursuant to valid checkoff authorizations that have not expired or been revoked, the checked off sums shall be remitted to the Union as set forth in the remedy section of this decision. If the dues were deducted pursuant to checkoff

[1] *J. R. Simplot Co.*, 311 NLRB 572 (1993); *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[2] *Independent Stave Co.*, 248 NLRB 219, 221 (1980).

authorizations which have expired or been revoked, those sums shall be returned to the employees.

## CONCLUSIONS OF LAW

1. By failing to make contractually required monthly contributions to the Union's Pension and Welfare Funds, and by failing to remit checked off union dues to the Union prior to expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By failing to remit checked off union dues to the Union and/or the employees after expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to remit to the Union dues that were deducted from the pay of unit employees before the expiration of the collective-bargaining agreement, we shall order the Respondent to remit such withheld dues to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having found that the Respondent has violated Section 8(a)(1) by retaining for itself dues deducted from the pay of unit employees after the expiration of the collective-bargaining agreement, the Respondent shall be ordered to remit those sums to the Union, provided that the dues were deducted pursuant to valid, unexpired, and unrevoked dues-checkoff authorizations. If the dues were deducted pursuant to checkoff authorizations which had expired or been revoked, the Respondent shall return the withheld dues to the employees, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the Union's Pension and Welfare Funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.[3]

## ORDER[4]

The National Labor Relations Board orders that the Respondent, Talaco Communications, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to remit to the Union dues checked off pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement, and to make required contributions to the Union's Pension and Welfare Funds.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights to join and assist a labor organization, by failing to remit to the Union dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' valid, unexpired and unrevoked checkoff authorizations, or by failing to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' checkoff authorizations which had expired or been revoked.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union all dues it deducted from employees' pay pursuant to valid dues-checkoff authorizations prior to the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(b) Remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, all dues it deducted from employees' pay after the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(c) Remit the delinquent Pension and Welfare Fund contributions, including any additional amounts due the Funds, and reimburse the unit employees for any expenses ensuing from the Respondent's failure to make

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] The Order conforms to the new standard language recently set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996).

the required payments, in the manner set forth in the remedy section of the decision.

(d) On request, bargain with Communications Workers of America, Local 1109, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed in the States of New York, New Jersey & Connecticut excluding clerical employees, guards and supervisors as defined by the National Labor Relations Act, as amended.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 12, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to remit to the Union dues we deducted pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement, and to remit required contributions to the Union's Pension and Welfare Funds.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your rights to join and assist a labor organization, by failing to remit to the Union dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to the employees' valid, unexpired, and unrevoked checkoff authorizations, or by failing to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' checkoff authorizations which had expired or been revoked.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit to the Union all dues we deducted from the employees' pay pursuant to valid dues-checkoff authorizations prior to the expiration of the collective-bargaining agreement, with interest.

WE WILL remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, all dues we deducted from employees' pay after the expiration of the collective-bargaining agreement, with interest.

WE WILL remit the delinquent Pension and Welfare Fund contributions, including any additional amounts due the Funds, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, on request, bargain with Communications Workers of America, Local 1109, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed in the States of New York, New Jersey & Connecticut excluding clerical employees, guards and supervisors as defined by the National Labor Relations Act, as amended.

TALACO COMMUNICATIONS, INC.